(2)

No. 95-1621

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HARBOR TUG AND BARGE COMPANY,

Petitioner,

v.

JOHN PAPAI and JOANNA PAPAI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1). Is an injured maritime worker barred from recovering as a seaman under the Jones Act, 46 U.S.C. App. §§ 688, *et seq.*, after an Administrative Law Judge determines that he was an LHWCA worker at the time of injury?

2). Is an injured maritime worker's status as a seaman to be determined by his work history only with his employer at the time of the injury, or with each of his maritime employers?

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STATEMENT OF THE CASE

The instant case was filed in January of 1990. The District Court granted petitioner Harbor Tug & Barge (''HT&B'') a partial summary judgment the following May on the ground that the Plaintiff (''Papai'') was not a seaman under the Jones Act.[1] Though the trial court certified that ruling for interlocutory review, under 28 U.S.C. § 1292(b), The Ninth Circuit refused to consider it. The matter was thereafter rebriefed

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[1] *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 205 (9th Cir. 1995).

and reargued before the trial court, in light of *McDermott International, Inc. v. Wilander*[2] and *Southwest Marine, Inc. v. Gizoni*[3], but the original ruling was reaffirmed on April 6, 1992.

Temporarily bereft of his Jones Act remedies, and having no immediate recourse to the Court of Appeals, Papai filed a compensation claim under the LHWCA. In violation of the equitable estoppel outlined in *Roth v. McAllister Bros., Inc.*,[4] and eschewing the partial summary judgment it had received in District Court, HT&B then turned around and asked the Administrative Law Judge ("ALJ") to dismiss Papai's LHWCA claim on grounds that he was "a member of a crew of a vessel" under 33 U.S.C. § 902(3)(G). Plaintiff's workers' compensation attorneys failed to raise *Roth*, or the doctrine of equitable estoppel in response. With all due respect to our colleagues, this was not good lawyering. Worse, the ALJ erroneously concluded that the prior summary judgment posed no collateral estoppel because the District Court's ruling was still subject to appeal. But, "the federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as *res judicata* or collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding *de novo*."[5] Unfortunately the ALJ ignored that rule, concluded all over again that Mr. Papai was not a seaman, and issued a formal decision awarding him LHWCA benefits in August of 1992.[6]

Shortly afterward, in the ongoing litigation, the District

[2] 498 U.S. 337 (1991).

[3] 502 U.S. 81 (1991).

[4] 316 F.2d 143 (2d Cir. 1963).

[5] 1B *Moore's Federal Practice* (2d ed.) ¶0.416[3] p. 521-522. *See also, Hunt v. Liberty Lobby*, 707 F.2d 1493, 1497 (D.C. Circ. 1983).

[6] *Papai, supra*, 76 F.3d at 205.

Court tried the plaintiff's remaining third-party tort claim for vessel owner negligence in admiralty, because the partial summary judgment had deprived him of his Jones Act jury rights, and entered a judgment in favor of the defendant in December of 1992. Plaintiff appealed and the Ninth Circuit reversed the District Court's judgment and remanded the case for a Jones Act jury trial notwithstanding the ALJ's intervening, albeit unnecessary, determination that Papai was not a seaman. The trial is now set for November 25, 1996.

The Ninth Circuit decision below reversed the granting of summary judgment on seaman status by finding that there was a triable issue of fact as to Papai's permanent connection to the vessel. In so far as the decision below expands upon the legal standards set forth in *Chandris, Inc. v. Latsis*[7] to include maritime employers beyond the one at the time of injury, it is *dictum* because all of Papai's assignments were with HT&B up to the time of his accident.

Likewise, in so far as the decision below relates to the relationship between the ALJ and District Court adjudications of seaman status, it is also *dictum* because the ALJ should have based his decision on the district judge's determination (granting partial summary judgment) rather than deciding it on his own.

Needless to say, this unlikely skein of errors, omissions and parallel decisions is not likely to occur again. Those convolutions freight the record in this case with obvious prudential problems.

[7] ___ U.S. ___, 115 S.Ct. 2172 (1995).

REASONS FOR DENYING THE WRIT

I. BECAUSE THE NINTH CIRCUIT REMANDED THIS CASE FOR TRIAL, IT IS NOT YET RIPE FOR SUPREME COURT REVIEW.

HT&B has petitioned for certiorari even though the Ninth Circuit remanded this case for a jury trial in District Court. Because the jury could decide that Mr. Papai was not a Jones Act seaman, HT&B could ultimately obtain the result it wants without Supreme Court intervention. In short, the petition is interlocutory and premature. As this Count ruled in *Brotherhood of Loc. Fire & Eng. v. Bangor & A. R. Co.*:[8]

> "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."[9]

This Court should rule the same way here for the same reason.

II. THERE IS NO DIRECT, IRREMEDIABLE CONFLICT BETWEEN THE CIRCUITS.

As this Court stated in *Gizoni*,[10] an employee who receives voluntary payment under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act.[11] The only remaining question, then, is what happens "[w]hen the compensation process has gone beyond acceptance of benefits and even beyond the filing of a claim to the point at which a formal award has been entered"?[12] HT&B

[8] 389 U.S. 327 (1967)
[9] *Id.* at 328
[10] 502 U.S. at 91-92.
[11] 33 U.S.C. § 903(e)
[12] 4A Larson, *The Law of Workman's Compensation*, § 90.51 at 16-357.

insists that a formal award should bar injured employees like John Papai from seeking subsequent seaman's remedies. Its petition suggests that the decision below stands alone in prohibiting that result. But as *Gilmore and Black* summed up:

> "Even the payment of benefits pursuant to a formal award in a contested proceeding is not necessarily fatal to the Jones Act action. The courts have shown themselves receptive to the argument that the compensation award may have been made without a proper adjudication of the claimant's status as harbor worker or seaman."[13]

Indeed, quite apart from the decision below, there are reported state and federal decisions which conclude outright that, because of special policies involved, a Jones Act case cannot be barred by a formal compensation award.[14] The petition overlooks those cases, and that policy, when it contends that the decision below conflicts squarely with the opinions of the Fifth and Second Circuits. Nothing about this corner of the law is perfectly square.[15]

[13] *G. Gilmore & C. Black, The Law of Admiralty*, 435, *text accompanying fn. 335n*, (2d ed. 1975) *citing*, Larson, *supra*, § 90.51, at 16-357; *Simms v. Valley Line Co.*, 709 F.2d 409, 412-413 (5th Cir. 1983), *Boatel, Inc. v. Delamore, citing*, 379 F.2d 850, 854-855 (5th Cir. 1967); *Mike Hooks, Inc. v. Pena*, 313 F.2d 696, 700-701 (5th Cir. 1963). See also *Bretsky v. Lehigh Valley R.R. Co.*, 156 F.2d 594, 596 (2d Cir. 1946) [declining to bar FELA claim with prior state compensation award where question of interstate comerce had not been litigated].
[14] *Biggs v. Norfolk Dredging*, 360 F.2d 360, 365 (5th Cir. 1966); *De Court v. Beckman Instruments, Inc.*, (1973) 32 Cal.App.3d 628, 635, 108 Cal.Rptr.109; *see also, Simms. supra.*
[15] As this Court observed in *Chandris*, when it comes to questions of Jones Act status, 'We have made a labyrinth and got lost in it.' *Chandris, supra*, ____ U.S. at ____, 115 S.Ct. at 2184.

HT&B contends that the decision below conflicts with the Fifth Circuit's opinions in *Sharp v. Johnson Bros. Corp.*[16] and *Fontenot v. AWI Inc.*,[17] and the Second Circuit's opinions in *Hagen v. United Fruit Co.*[18] and *Roth v. McAllister Bros., Inc.*[19] However, as demonstrated below, these cases are either compatible, distinguishable or no longer good law.

First, the Second Circuit's decision in *Roth* is perfectly compatible with the decision below. Far from presecuting a Jones Act claim in the wake of a compensation award, the plaintiff in *Roth* acquiesed in his employer's assertion that he was a tugboat hand and a Jones Act seaman, and suffered the denial of his state workers' compensation claim by the New Jersey Department of Labor and Industry.[20] When his widow subsequently petitioned the District Court for the Southern District of New York for an award of maintenance, the employer turned around and argued that the decedent had *not* been a seaman. The District Court rejected that argument and so did the Second Circuit. Ruled the Second Circuit:

> "A party having assumed a certain position in a legal proceeding and having succeeded in maintaining that position, as defendant did here by its motion before the New Jersey Compensation Court, may not thereafter assume a contrary position in a subsequent proceeding elsewhere simply because its interests have changed, especially if the change be to the prejudice of the party who has acquiesced in the position formerly taken."[21]

[16] 923 F.2d 423 (5th Cir. 1992)
[17] 923 F.2d 1127 (5th Cir. 1991).
[18] 135 F.2d 843 (2d Cir. 1943).
[19] 316 F.2d 143 (2d Cir. 1963).
[20] *Roth, supra,* 316 F.2d at 144-145.
[21] *Id.* at 146.

There is nothing in that ruling which conflicts with the decision below. Neither John Papai nor HT&B ever acquiesced in the position of the other. Moreover, as both the decisison below and this Court's opinion in *Gizoni* remind us, '[w]here full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear.'[22] Thus, there were no equitable reasons to estop any of the parties' arguments in the present case. To the contrary, as the decision below explained:

> "In determining whether prior litigation of plaintiff's LHWCA claims bars his subsequent Jones Act claim, we are mindful of the reasoning expressed by the *Gizoni* Court and are further concerned with the fairness in imposing such a bar where it could work a disincentive on the part of the employer to vigorously litigate its defense in the LHWCA action. This is so because the parties are on opposite sides of the seaman issue under the LHWCA as compared with their positions under the Jones Act. Furthermore, imposing such a bar would result in subjecting to suit an employer who immediately and voluntarily begins compensation payments while immunizing from suit an employer who forces his employee to seek compensation through litigation."[23]

This reasoning is perfectly consistent with the ruling in *Roth*.

Nor is the decision below in conflict with the Second Circuit's dusty ruling in *Hagen v. United Fruit Col.*[24]. While

[22] *Papai,supra,* 67 F.3d at 207, *quoting, Gizoni, supra,* 502 U.S. at 92, fn. 5.
[23] *Papai, supra,* 67 F.3d at 207.
[24] 135 F.2d 842 (2d Cir. 1943).

Hagen did in fact conclude that an administrative award under the LHWCA was a bar to subsequent Jones Act litigation (''because no such award could be made validly without a determination that plaintiff was not a member of the crew''),[25] that holding was handed down back in 1943 when 33 U.S.C. § 903(a) still flatly provided that compensation was not payable ''in respect of disability or death of . . . a member of a crew of any vessel.'' The *Hagen* Court therefore viewed ''a finding as to non-membership in the crew to be what has been called a finding of a 'jurisdictional fact.' ''[26] In other words, the rule in *Hagen* was based on preemptive jurisdiction, not collateral estoppel. Such strictures have since been removed by Congress.

33 U.S.C. § 903(a) was amended, together with the rest of the Act, in 1972 and again in 1984, and does not speak of crew members any more. Those amendments ''changed what was essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured.''[27] Ever since the '84 amendments, the so-called ''crew member'' exclusion has resided among the Act's ''status'' provisions in 33 U.S.C. § 902(3)(G), where it is stated as a statutory exception to the definition of a covered ''employee.''[28] Rather than posing questions of ''jurisdictional fact'', the modern status test merely presents

[25] *Id.* at 843.

[26] *Id.*

[27] *Northwest Marine Terminal Co. Inc. v. Caputo, supra,* 432 U.S. 249, 264-265 (1977).

[28] 33 U.S.C. § 902(3)(G) [''The term 'employee' means any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harbor-worker, including a ship repairman, shipbuilder, and ship-breaker, but such term does not include — * * * (G) a master or member of a crew of any vessel;''].

issues of ''coverage.''[29] In sum, *Hagen* is no longer good law. As such, it does not conflict with the decision below.

Neither does the holding in *Fontenot*. First of all, there is nothing in *Fontenot* to suggest that the plaintiff received a formal LHWCA award from an Administrative Law Judge (or ''ALJ''). To the contrary, it merely appears that the deputy commissioner issued an informal recommendation that the plaintiff's injury fell within the Act's coverage.[30] Once a claim has been filed, the deputy commissioner is empowered to make informal investigations and recommendations, but no formal determinations.[31] Since 1972, all adjudicatory power under the Act has been entrusted to the Office of the Administrative Law Judge.[32] As we have already seen, the simple fact that a worker files a claim before the deputy commissioner, or receives LHWCA benefits without a formal award, has never barred a subsequent Jones Act claim.[33] *Fontenot* is misplaced to the extent that it suggests anything to the contrary.[34]

Fontenot also holds that workers' compensation is the exclusive remedy for all maritime workers covered by the LHWCA.[35] ''However,'' as this Court explained in *Gizoni*, ''this argument ignores the fact that some maritime workers may be Jones Act seamen performing a job specifically enumerated under the LHWCA.''[36] *Fontenot*, of course, was handed down several months before the Supreme Court's

[29] *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 1359 (9th Cir. 1981).

[30] 923 F.2d at 1128.

[31] 33 U.S.C. § 919(c).

[32] *Id.*

[33] E.g., *Biggs, supra; Boatel, supra,* 379 F.2d at 854.

[34] *Gizoni, supra,* 502 U.S. at 90-92.

[35] 923 F.2d at 1132.

[36] 502 U.S. at 89.

decision in *Gizoni*, and like *Hagen* before it, is no longer good law. At all events, it cannot be said to create a certworthy conflict with the decision below.

While the language in *Sharp*[37] does not square with the reasoning or result in the decision below, both cases present peculiar, fact-bound decisions arising from convoluted procedural histories that are not likely to recur. Therefore, any conflict between the two decisions should not be the basis for Supreme Court review.

If anything, the procedural history in *Sharp*, was more convoluted than the one in this case. The plaintiff there, Earnest Sharp, initiated administrative proceedings with the deputy commissioner shortly after his November 1985 accident. After the deputy commissioner notified the parties that the injury "'appear[ed] to fall under the jurisdiction of the [LHWCA]' ",[38] the employer began to pay voluntary benefits. In November of 1986, however, Sharp filed a parallel Jones Act suit in District Court. The employer promptly terminated LHWCA benefits, and "raised the defense that Sharp was a Jones Act seaman and thus not eligible for longshore compensation."[39] The parties did not request an ALJ hearing, but pushed the District Court case to trial instead.

In June of 1989, the District Court granted the employer a directed verdict in Sharp's Jones Act case "on the grounds that the barges were not vessels and that he was not a seaman."[40] Sharp appealed that determination to the Fifth Circuit the following October. By September of 1989, however, Sharp had settled his LHWCA claims for $225,000.

[37] *Id.* at 426.
[38] *Sharp, supra*, 973 F.2d at 424.
[39] *Id.*
[40] *Id.*

A final release was executed on October 5, 1989 (just as the Jones Act case was being transferred to the Court of Appeals), and the ALJ promptly approved the settlement.[41] But the parties never advised the Court of Appeals of their agreement. In November of 1990, the Fifth Circuit therefore reversed the directed verdict and remanded the case for another trial "on the ground that a fact question existed as to whether Sharp worked aboard a fleet of vessels and thus was a seaman."[42]

On remand, the District Court granted the employer summary judgment on grounds that Sharp's LHWCA settlement comprised an election against his Jones Act rights.[43] The Fifth Circuit affirmed under the doctrine of collateral estoppel, ruling that "where the ALJ issues a compensation order ratifying a settlement agreement, a 'formal award' should be deemed to have been made under *Gizoni*, and the injured party no longer may bring a Jones Act suit for the same injuries."[44]

The result and rationale in *Sharp* are at least as inextricably tied up with the peculiar history and facts as the present case. Indeed, they seem to have been fashioned out of pique, in the wake of *Sharp 1*, by a Circuit Court that was understandably weary of the case before it and annoyed with the attorneys who brought it there. As the Fifth Circuit bluntly noted:

> "[W]e are distressed by the conduct of the attorneys for Sharp, Johnson Brothers, and Wausau during [a] previous appeal. Although we have no basis upon which to ascertain their motives, we are surprised that the parties failed to bring to our attention the fact that they had settled at least one

[41] *Id.*
[42] That decision was also published under the title of *Sharp v. Johnson Bros. Corp.*, 917 F.2d 883 (5th Cir. 1991) and shall hereinafter be referred to as *Sharp 1*.
[43] *Sharp, supra*, 973 F.2d at 424-425.
[44] *Id.* 973 F.2d at 426.

> aspect of their dispute. We recognize that counsel may legitimately have believed that the LHWCA settlement was irrelevant to the Jones Act action. Nevertheless, candor and respect for this court would dictate that the parties inform us of so significant a development in their litigation."[45]

Whether or not that distress spilled over into the Fifth Circuit's reasoning, it is very difficult to see how this Court can reach the issues framed by *Sharp* and the decision below without wading through the complicated facts, curious strategies and tangled histories that bedeviled both cases. Furthermore, even if a clear cut conflict were somehow visible through that thicket, its ultimate resolution would be far surer and easier if it is given more time to percolate through the lower courts.[46]

This Court did not really confirm the mutual exclusivity of these two statutes until February of 1991, when the *Wilander* case finally held that "a member of a crew" under the LHWCA and a "seaman" under the Jones Act are one and the same creature.[47] Until then there was widespread confusion on that point.[48] It is only since *Wilander* that the courts have come to recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based

[45] *Sharp, supra,* 973 F.2d at 427 fn. 3.

[46] *See gen.* Stern, Gressman & Shapiro, *supra,* § 4.4, at 200, Comment, "Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?" 54 U.Pitt.L.Rev. 861 (1993).

[47] *Supra,* 498 U.S. at 352.

[48] *Id.* at 814 [noting that "The confusion began with *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251 (1940)."]. *Compare, Bassett, supra,* 309 U.S. at 260, *and, Ramos v. Universal Dredging Corp.,* 547 F. Supp. 661, 667 (D.C.Ha. 1982), *Lewis v. Roland E. Trego & Sons,* 359 F.Supp. 1130 (D.C.Md. 1973); *Ramos v. Universal Dredging Corp.* 15 Ben.Rev.Bd.Serv. 140 (BRB, 1982).

and sea-based maritime employees."[49] As last summer's *Chandris* decision demonstrates, we are still in the process of drawing that distinction. Indeed, as *Sharp* suggests, a few courts still haven't digested the notion that "some maritime workers may be Jones Act seamen performing a job specifically enumerated in the LHWCA."[50] At all events this Court's *Gizoni* decision, and the corollary question of whether "some maritime workers" can still sue for Jones Act remedies after receiving a formal LHWCA award, hasn't really had a chance to percolate through the lower courts. The decision below, after all, merely "extended the reasoning of the *Gizoni* court to the next logical step."[51] Such extrapolation is the engine that drives all judicial interpretation.

It is well settled, especially in the centuries old and slow-changing field of maritime law,[52] that this Court will not usually consider an important question until the lower courts have had ample time to "sift" through it for themselves.[53] The idea is that this Court's ultimate "resolution will be better informed if it gives the conflict time to 'percolate' in the lower courts."[54] That would certainly seem to be the case here. While HT&B's petition focuses solely on the supposedly stark inter-circuit conflict between *Sharp* and *Papai,* the situation is nowhere near that clear cut.[55]

Because "[t]he decision to grant certiorari represents a commitment of scarce judicial resources,"[56] those valuable

[49] *Wilander, supra,* 498 U.S. at 353.

[50] 502 U.S. at 89

[51] *Papai, supra,* 67 F.3d 208.

[52] *See gen.* Tetley, The General Maritime Law — *the Lex Maritima,*" 20 Syracuse J. Int'l L & Comm. 105, 107 (Sp. 1994).

[53] *Moragne v. State Marine Lines,* 398 U.S. 375, 408 (1970).

[54] Sturley, *Filing and Responding to a Petition for Certiorari,* 24 J. of Mar. Comm. 595, 625 (October 1993).

[55] *Compare, e.g. Simms, Boatel,* and *Young & Co. v. Shea,* 397 F.2d 185 (5th Cir. 1968) to *Sharp.*

[56] *Oklahoma City v. Tuttle,* 471 U.S. 808, 816 (1985).

resources should not be squandered to resolve such conflict as exists between *Sharp* and the decision below. Both decisions involve complex procedural histories, and are clearly and distinctly tied to the peculiar facts that produced them.

III. THE QUESTION OF WHETHER A UNION HAND'S ENTIRE WORK HISTORY SHOULD BE EXAMINED, WHEN WEIGHING "THE TOTAL CIRCUMSTANCES" OF HIS VESSEL-RELATED EMPLOYMENT UNDER *CHANDRIS* IS NOT YET RIPE FOR SUPREME COURT REVIEW.

After decades of confusion, it is now finally established that the test for seaman status is "composed of two distinct elements: 1) The worker must have an 'employment related connection to a vessel in navigation' and 2) The worker must 'contribute to the function of the vessel or to the accomplishment of its mission.' "[57] Just last summer, the *Chandris* decision reviewed the first of those two elements and confirmed that "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."[58] Illuminating the issue further, *Chandris* also affirmed that "the total circumstances of an individual's employment must be weighed to determine whether he had sufficient relation to the navigation of vessels and the perils attendant thereon."[59] The decision below quoted that language verbatim and ruled that, at least in the case of a "casual" worker dispatched from a union hiring hall to different tugs and different employers on a day to day basis,[60] "all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to

[57] 1 Schoenbaum, *Admiralty and Maritime Law* (3d ed.) 260 *quoting Wilander, supra*, 498U.S. at 344.
[58] *Chandris, supra*, ____ U.S. at ____, 115 S.Ct. at 2191.
[59] *Chandris, supra*, ____ U.S. at ____, 115 S.Ct. at 2191.
[60] *Papai, supra*, 67 F.3d at 204-205.

(and after, if any) the accident, as well as work performed for other employers during the relevant time should be considered in making the [seaman status] determination."[61] Reasoned the Court:

> "There would appear to be no reason that a group of employers who join together to obtain a common labor pool on which they draw by means of a union hiring hall (in this case the Inland Boatman's Union hiring hall), should not be treated as a common employer for purposes of determining a maritime worker's seaman status. If the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system. Under such circumstances, a maritime worker who regularly performs seaman's work is entitled to seaman status."[62]

Though the ink is barely dry on *Chandris*, HT&B petitions this Court to review the interpretation of it in the decision below. Unlike the first question raised by the petition, there actually is a direct conflict between the Third, Fifth and Ninth Circuits over the seaman status of "casual" workers, like John Papai, who spend all or most of their time aboard tugs, ships and other vessels but lack a permanent connection with any particular vessel or vessel owner.[63] Under the decision below, the Ninth Circuit is prepared to treat such workers as seamen. They not only perform what this Court has called "a classic

[61] *Id.* at 206.
[62] *Id.*
[63] *See gen.* Albritton & Robinson, *Seaman Status After Chandris, Inc. v. Latsis*, 8 U.S.F.Mar.L.J. 29, 71 (Sp. 1996).

seaman's job'',[64] but they are exposed to " 'the special hazards and disadvantages to which they who go down to the sea in ships are subjected.' ''[65] The Third and Fifth Circuits, however, have taken a different view.[66] Nevertheless, this issue too should be given more time to percolate.

First of all, the fact that the decision below was fact-bound and interlocutory is just as fatal to this portion of HT&B's petition as it was to the other.[67] This case, once again, has been remanded for trial later this year. A jury may yet find against John Papai's seaman status, deny his negligence and unseaworthiness claims or otherwise grant HT&B the relief it desires without the need for this Court's intervention.

Moreover, Papai had only worked with HT&B up to the time of his accident. Therefore, were this Court to find, as petitioner hopes, that the Ninth Circuit erred in stating a claimant's seaman status should be based upon his work history with all his employers, the decision would not affect the determination of Papai's status because Papai worked only for HT&B. Thus even if this Court wants to consider this issue, this is not the case to accept for that purpose.

More importantly, the petitioner's seaman status arguments just don't give this Court any good reasons for returning to a subject that it has so recently and repeatedly addressed. Between 1991 and 1993, for example, the Court denied certiorari in numerous interesting Jones Act cases[68] (including

[64] *Chandris, supra,* ____ U.S. at ____, 115 S.Ct. at 2191

[65] *Id.* at 2190.

[66] *Compare, Barrett v. Chevron, U.S.A.*, 781 F.2d 1067, 1074 (5th Cir. 1986) *and Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247, 1251 (3d Cir. 1994) with the decision below.

[67] *Brotherhood of Loc. Fire & Eng. v. Bangor & A.R. Co., supra;* Sturley, *supra.*

[68] *See e.g., Bolden v. Offshore Specialty Fabricators, Inc.*, 113 S.Ct. 2441 (1993); *National Union Fire Insurance Co. v. Electro-Coal Transfer Corp.*,

not only *Harwood v. Partredereit AF* and *Bach v. Trident Steamship Co.*[69] but *Ashley v. Epic Divers, Inc.*)[70] simply to give the lower courts time to fathom *Wilander* and *Gizoni* before returning to those issues. After voyaging through those issues yet again, just last summer in *Chandris*, there is even less reason to resurvey the now well-charted test for seaman status. *Chandris* has hardly dropped anchor among the circuits. The decision below was one of the first decisions to apply and interpret it on the West Coast. Whether or not the decision below misreads *dictum* from *Chandris*, and respondent respectfully submits that it does not, this Court should let that *dictum* make a few more landfalls before hauling it up on the ways again.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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113 S.Ct. 1262 (1993); *Campo v. Electro-Coal Transfer Corp., Inc.*, 112 S.Ct. 1261 (1992); *Setton Construction Inc. v. Domingue*, 113 S.Ct. 77 (1992)

[69] *Back v. Trident Steamship Co.*, 112 S.Ct. 1996 (1992); *Harwood v. Partredereit AF*, 112 S.Ct. 1265 (1992).

[70] 113 S.Ct. 1415 (1993).